Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

HOWARD WYATT,

Petitioner,

VERSUS

BILL COLE and JOHN ROBBINS, II

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Do private parties, who initiate use of an unconstitutional statute, have available the qualified immunity defense of public officials?

2. Should 42 USC Sec. 1983 be construed to provide a defense of qualified immunity for private parties, when no such immunity is contained in the language of the statute?

3. Should this Court judicially declare an immunity for private parties who, through ignorance, violate constitutional rights when such immunity is at the expense of the innocent victims of the constitutional violation?

4. Does the United States Court of Appeals have authority to disregard the majority opinion of this Court?

5. When a four Justice plurality of this Court holds private parties are not entitled to qualified immunity and a two Justice concurrence joins the plurality opinion, may a Court of Appeals, nevertheless, grant qualified immunity?

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 994 F. 2d 1113 (5th Cir. 1993). It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on June 25, 1993. This Court has jurisdiction to review by a Writ of Certiorari under 28 USC Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitu-

tion Amendment Fourteen, which says:

> "...(n) or shall any state deprive any person of life, liberty or proper[illegible] without due process of law."

FEDERAL STATUTE INVOLVED

The federal statute involved is 42 USC Section 1983, which says:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

STATEMENT OF THE CASE

Respondent, Bill Cole, hired Respondent, Attorney John Robbins, II to obtain an ex parte court order for the seizure of cattle and other personal property from Cole's business partner, Petitioner Howard Wyatt. Attorney Robbins utilized the Mississippi Replevin Statute (*Miss. Code Ann.*, Sec. 11-37-101) to accomplish the hearingless seizure. After obtaining an ex parte court order, as allowed by the Mississippi Replevin Statute, Cole, Robbins and various law enforcement officials appeared on the property of Peptitioner Wyatt and forcibly took possession of 23 head of cattle and other property which was owned by Wyatt and Cole under a partnership agreement. R., 1234-1236. The hearingless seizure of Wyatt's property by force caused him to suffer severe psychological trauma, and he was hospitalized.

Following a post-deprivation hearing, a state judge ordered the Respondent Cole to return the property or its value to Petitioner, but Cole ignored the order. R., 1234-1236.

Petitioner Wyatt filed suit in the United States District Court for

the Southern District of Mississippi, against governmental officials who had carried out the hearingless seizure and against private defendants, Cole and Robbins. The District Court declared the Replevin statue (Miss. Code Ann., Sec. 11-37-101) under which Petitioner's property was seized unconstitutional. *Wyatt v. Cole*, 710 F. Supp. 180. However, the District Court held Plaintiff was not entitled to damages from either the officials who carried out the seizure or from the private Defendants Cole and Robbins. The District Court held both the officials and the private parties had qualified immunity. Supp. R., 3-7; R., 1647.

Wyatt appealed the grant of qualified immunity to the private Defendants to the United States Court of Appeals for the Fifth Circuit. Citing its own precedents, but noting contrary rulings from other Courts of Appeals, the Fifth Circuit upheld the private Defendants' qualified immunity defense. 928 F. 2d 718. This Court granted certiorari to resolve the conflict between the Courts of Appeals as to whether the qualified immunity doctrine applies in favor of a private party.____U. S.____, 116 L. Ed. 2d 25, 112 S. Ct. 47 (1991). On May 18, 1992, this Court held that private parties are not entitled to qualified immunity, but left open the question of whether some type of probable cause or subjective good faith defense is available to private parties who violate constitutional rights.____U. S.____, 112 S. Ct. 1817, 118 L. Ed. 2d 504 (1992).

On remand, the United States Court of Appeals for the Fifth Circuit, in opinion of June 25, 1993, granted the private defendants the very same qualified immunity which the Court had just held is unavailable to them. 994 F. 2d 1113 (5th Cir. 1993).

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT, SINCE THE FIFTH CIRCUIT FAILED TO FOLLOW THIS COURT'S MAJORITY.

No serious person can deny that the decision of the United States Court of Appeals for the Fifth Circuit conflicts with the opinions of a majority of this Court.

On page 10 of the slip opinion, Justice O'Connor, speaking for

four Justices, succintly states this Court's holding:

> "The precise issue encompassed in this question and the only issue decided by the lower court is whether qualified immunity, as enunciated in *Harlow, supra*, is available for private defendants faced with Sec. 1983 liability for invoking a state replevin, garnishment or attachment statute, The answer is no. . . ."

The concurring opinion of Justice Kennedy, joined by Justice Scalia, specifically joined Justice O'Connor's opinion.

On remand, the Fifth Circuit held:

> "We now hold that Plaintiffs seeking to hold private actors liable under *Luger v. Edmondson Oil Co.*, 102 S. Ct. 2744 (1982), must demonstrate that Defendants failed to act in good faith in invoking the unconstitutional state procedures. Because Wyatt has not shown that Cole or Robbins either knew or should have known that Mississippi's replevin statute was unconstitutional prior to its invalidation in April, 1989, we affirm the District Court's judgment."

Surely certiorari should be granted when the United States Court of Appeals declines to follow a binding precedent of this Court. *Day & Simmerman, Inc. v. Challoner*, 423 U. S. 3 (1975), reversed the United States Court of Appeals for the Fifth Circuit when that Court declined to follow this Court's choice of law rules enunciated in *Klaxon & Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487 (1941). This case is more compelling than *Challoner* for granting the Writ. Here, the Court of Appeals has declined to follow the decision of this Court in this very case, on the very issue this Court specifically decided.

The Court of Appeals' reading together the dissenting and concurring opinion to form a so called "majority" in favor of qualified immunity for private parties is bizarre. The concurring opinion specifically joins Justice O'Connor's opinion. Six members of this Court have agreed that the qualified immunity of *Harlow v. Fitzgerald*, 457 U. S. 800 (1982), is unavailable to private parties. A lower court has no authority to say otherwise.

The result reached by the Court of Appeals for the Fifth Circuit is fundamentally at odds with the goal of 42 USC Sec. 1983 of providing redress for parties injured by violation of constitutional rights. Through various immunity doctrines, all defendants who might be held liable to the innocent Wyatt for the taking of his property without due process of law have been immunized. The state of Mississippi, which enacted the unconstitutional statute, is immunized by virtue of the Eleventh Amendment. The judge who authorized the issuance of the Writ, is immunized by his judicial office. The Sheriff who carried out the Writ is immunized because he was merely following the orders of the judge. When the Fifth Circuit then immunizes the private parties, it has totally immunized every party who violates constitutional rights at the expense of the innocent victim. It is not sound judicial construction to immunize wrongdoers, even those who act only through ignorance, at the expense of the innocent. To do so in the face of the opinion of a six member majority of this Court is an outrage.

Respectfully submitted,

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APPENDIX

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United States Court Of Appeals
For The Fifth Circuit

NO. 90-1058

HOWARD L. WYATT,

Plaintiff-Appellant,

versus

BILL COLE, JOHN ROBBINS, II,

Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Mississippi

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES Before JOHNSON, WILLIAMS, AND HIGGINBOTHAM, Circuit Judges. HIGGINBOTHAM, Circuit Judge:

This 1983 suit returns to this panel on remand from the Supreme Court. In our first opinion, we affirmed the district court's grant of qualified immunity to defendants Cole and Robbins. *Wyatt v. Cole*, 928 F.2d 718 (5th Cir. 1991). The Supreme Court reversed, holding that "qualified immunity, as enunciated in (*Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982), is (not) available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment or attachment statute." 112 S.Ct. 1827, 1834 (1992). In so doing, the Court explained that its decision did "not foreclose the possibility" that private defendants "could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require

plaintiffs to carry additional burdens." *Id.*

We have requested, and received, supplemental briefs from Wyatt, Cole, and Robbins. In keeping with the Court's suggestion, as well as the more explicit guidance provided by Justice Kennedy's concurring opinion, *id.* at 1835-37 (Kennedy, J., concurring), and the Chief Justice's dissent, *id.* at 1838-39 (Rehnquist, C.J., dissenting), we now hold that plaintiffs seeking to hold private actors liable under *Lugar v. Edmonson Oil Co.*, 102 S.Ct. 2744 (1982), must demonstrate that defendants failed to act in good faith in invoking the unconstitutional state procedures. Because Wyatt has not shown that Cole and Robbins either knew or should have known that Mississippi's replevin statute was unconstitutional prior to its invalidation in April 1989, we affirm the district court's judgment.

I.

Howard Wyatt and Bill Cole are former business partners. Cole sought to dissolve the partnership in July 1986. When negotiations failed, Cole, with the assistance of his attorney, John Robbins, II, filed a state court complaint in replevin against Wyatt accompanied by a bond of $18,000. Pursuant to Miss. Code Ann. § 11-37-101, a writ of replevin issued and the county circuit judge signed an order directing the county sheriff to execute the writ a few days later. The sheriff seized 24 head of cattle, a tractor, and other property from Wyatt on July 29 and 30, 1986. The writ of replevin and summons were served on Wyatt the next day. On October 3, 1986, after a post-seizure hearing, the circuit judge dismissed Cole's complaint in replevin and ordered him to return the property to Wyatt. Although Cole had not yet complied with this order, the judge dismissed the action without prejudice on September 3, 1988.

In July 1987, Wyatt filed this § 1983 suit in U.S. District Court for the Southern District of Mississippi, contending that the seizure of his property without notice violated the Due Process Clause as well as several state provisions. The district court declared the state replevin statute unconstitutional on April 13, 1989, 710 F.Supp. 180, but held

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[1] The State of Mississippi and several county officials were also parties to this case in the district court and on appeal. Wyatt's claims against these defendants were resolved prior to argument in the Supreme Court and are therefore not before us.

that Cole and Robbins were entitled to qualified immunity from any damages suffered by Wyatt prior to this date under *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982). Wyatt conceded that he could not prove any damages resulting from defendants' conduct after the statute had been invalidated, but asserted that Cole and Robbins should be held liable for attorney's fees. The district court denied this request with respect to Cole and Robbins on grounds that a failure to recover money damages from defendants precluded a recovery of attorney's fees.

On appeal, we held that Wyatt's request for damages suffered prior to the district court's decision in 1989 was barred by *Folsom*, where this court held that " 'a § 1983 defendant who has invoked an attachment statute is entitled to an immunity from monetary liability so long as he neither knew nor reasonably should have known that the statute was unconstitutional.'" 928 F.2d 718, 721 (5th Cir. 1991) (quoting *Folsom*, 682 F.2d at 1037). Given our invalidation of a similar Georgia prejudgment statute in *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978), we recognized that the reasonableness of Cole's and Robbins' invocation of the Mississippi statute presented a close question. 928 F.2d at 721-22. We held, however, that Cole and Robbins, as private actors, should not be charged with the same degree of knowledge as public officials, and that, under this more liberal standard, their reliance on the law "was not an act of unreasonable ignorance." *Id.* at 722. We thereore affirmed the district court's grant of qualified immunity to Cole and Robbins.[2]

The Supreme Court then reversed, holding that qualified immunity is not "available for private defendants faced with §1983 liability

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2 We did reverse the district "court on the issue of attorneys' fees, holding that Cole, but not Robbins, was liable for fees incurred after the district court's declaratory judgment because this decision "affected the behavior of Cole towards Wyatt by effectively requiring him to return the propery seized." 928 F.2d at 723. We are no longer persuaded that this is correct. Cole offered to return the cattle soon after the district court's invalidation of the statute, but the record discloses that his overture was not accepted. Wyatt instead sought to recover damages for the loss of his share of the partnership's assets, which included the cattle. At trial, however, Wyatt conceded that he could not demonstrate that Cole's seizure resulted in a net loss, and thus could not establish any damages. Since Cole was not required to pay damages or otherwise change his behavior in any way as a result of the court's judgment, he has not been "prevailed against" and thus is not liable for attorneys' fees. See *Kentucky v. Graham*, 105 S.Ct. 3099, 3104 (1985).

for invoking a state replevin, garnishment or attachment statute." 112 S.Ct. 1827, 1834 (1992). While noting that private actors enjoyed a good-faith defense against suits for malicious prosecution and abuse of process at common law, the Court asserted that such history did not, by itself, entitle them to "the qualified *immunity* from suit accorded governmental officials under *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982)." 112 S.Ct. at 1832 (emphasis added). To the contrary, *Harlow's* recognition of "such an immunity w(as) based not simply on the existence of a good-faith defense at common law, but on the special policy concerns involved in suing government officials." *Id.* at 1833. Because *Harlow* " 'completely reformulated qualified immunity along principles not at all embodied in the common law, ' " *id.* (quoting *Anderson v. Creighton*, 107 S.Ct. 3034, 3042 (1987)], the doctrine could be extended only if suits agains private defendants implicated the same policies supporting immunity for public officials. The Court found that they did not. Qualified immunity, the Court explained, is necessary to ensure that "public officials are able to act forcefully and decisively in their jobs" and that "talented candidates (are) not deterred by the threat of damage suits from entering public service." *Id.* at 1833. Since these considerations are absent in the case of private parties, who of course "hold no office requiring them to exercise discretion," *id.*, the expansion of qualified immunity contended for by Cole and Robbins was unwarranted. Thus, the Court concluded that, "[a]lthough principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection for liability," *id.* at 1833, it could "offer no relief today." *Id.* at 1834.

The Court identified two issues for consideration on remand. Noting that this panel affirmed the district court's judgment solely on grounds of qualified immunity, the Court stated that its decision made it necessary to determine "whether Cole and Robbins, in invoking the replevin statute, acted under color of state law within the meaning of [*Lugar v. Edmonson Oil 'Co.*, 457 U.S. 922 (1982)]." 112 S. Ct. at 1834. The Court also indicated that its denial of qualified immunity did not

> foreclose the possibility that private defendants faced with liability under {Lugar] could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental

parties could require plaintiffs to carry additional burdens.

Id. We address these issues in turn.

II.

Section 1983 provides a cause of action against any person who, under color of state law, deprives another of rights secured by the Constitution. *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1066 (1992); 42 U.S.C. § 1983. In *Lugar v. Edmundson Oil Co.*, 102 S. Ct. 2744 (1982), the Supreme Court held that private parties invoking a state attachment statute may be held liable under 1983 if their actions are "fairly attributable to the state." *Id.* at 2753. The Court established a two-part test for determining whether the conduct alleged meets this requirement. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* Second, "the party charged with the depirvation must be a person who may fairly be said to be a state actor," that is, one who is in fact a state official, one who "has acted with or has obtained significant aid from state officials, " or one whose "conduct is otherwise chargeable to the State." *Id.* at 2754.

In applying this standard to the facts of before it, the Court in *Lugar* found the presence of the ex parte attachment statute sufficient to satisfy the first requirement: "[T] he procedural scheme created by the statute is obvioulsy the product of state action [and] is subject to constitutional restraints and properly may be addressed in a § 1983 action." *Id.* at 2756. The Court aslo found the private defendants' resort to this unconstitutional prodedure sufficient to meet the test's second, "joint participation" prong. *Id.* In so doing, the Court expressly rejected the argument "that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures." *Id.* This "low threshold" for establishing state action, at least where ex parte prejudgment proceedings are involved, *Davis Oil Co. V. Mills*, 873 F.2d 774, 779 (5th Cir.), *cert. denied.* 493 U.S. 937 (1989), has been recognized by the circuit, see, e.g., *Folsom*, 681 F.2d at 1037 ("when a § 1983 plaintiff challenges the constitutionality of a state attachment procedure . . . the private party who sets that attachment scheme in motion is to be considered a state actor"), and was confirmed by the Supreme Court in

Wyatt. 112 S. Ct. at 1830.

The district court held that Cole's invocation of the Mlississippi replevin statute was enough to trigger potential liability under § 1983. It also assumed, without expressly deciding, that Robbins, his attorney, had also acted under color of state law in requesting the writ of replevin. On remand from the Supreme Court, Cole challenges the district court's determination. Wyatt has maintained throughout this litigation that Cole's actions contravened not only federal law (in that the replevin statute operated to deprive him of his property without due process), but also state law, contending that Cole filed the complaint in bad faith, that replevin was improper under state law, and that Cole refused to return the cattle in violation of a state court order. Citing *Lugar*, Cole argues that he cannot be deemed a state actor because Wyatt's assertion that his conduct was contrary to, not consonant with, state law and policy locate the source of his harm in purely private actions for which the state cannot be held responsible.

This argument is not without merit. The Court in *Lugar* faced a similar charge that private defendants' attachment suit was "'unlawful under state law.'" *Lugar*, 102 S.Ct. at 2755. In discussing this claim the Court made plain that "private misuse of a state statute does not describe conduct that can be attributed to the State." *Id.* at 2756. The choice to invoke the "statute without the grounds to do so could in no way be attributed to a state rule or state decision"; this act is "contrary to the relevant policy articulated by the state." *Id.* at 2755. For this reason, complaints "alleg[ing] only misuse or abuse of the statute" do not "present a valid cause of action under § 1983." *Id.* at 2756. In the wake of *Lugar*, several courts have recognized and given effect to this principle. *See, e.g., Davis Oil Co.*, 873 F.2d at 779-80 (discussing *Lugar*); *Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1335-36 (10th Cir. 1992; *Hoai v. Vo*, 935 F.2d 308, 313-14 (D.C.Cir. 1991), *cert. denied*, 112 S.Ct. 1578 (1992); *Jones v. Poindexter*, 903 F.2d 1006, 1010-11 (4th Cir. 1990); *Collins v. Womancare*, 878 F.2d 1145, 1152-54 (9th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); *Winterland Concessions Co. v. Trela*, 735 F.2d 257,262 (7th Cir. 1984).

The district court nevertheless properly held that Cole's alleged misuse and violation of the Mississippi replevin statute did not preclude a finding that he acted under color of state law. Like the plaintiff in Lugar, 102 S. Ct. at 2755-56, Wyatt also challenged the constitutionality of the state law in asserting that his property had been

taken without due process. Because this claim centers on the procedures prescribed by the statute itself, rather than defendant's alledged abuse of them, it plainly implicates the state and its authority in the deprivation of constitutional rights. *Id.* The *Lugar* Court found state action present on analogous facts; so do we.

With respect to Robbins, the district court held that "[w]hile an action strictly within the scope of representation of a client does not normally constitute an act under color of state law, an attorney is still a person who may conspire to act under color of state law in depriving another of secured rights." Tower v. Glover, 467 U.S. 914, 920-23 (1984); Russell v. Milsap, 781 F.2d 381, 383 (5th Cir. 1985) *cert. denied*, 479 U. S. 826 (1986). *See Hoai*, 935 F.2d at 313 n.5. Cf. *Watertown Equipment Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487, 1496 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1723 (1988). Wyatt has not asserted that Robbins performed any acts lying outside the scope of his representation of Cole. The district court, however, assumed that Robbins acted under color of state law and Robbins himself concedes this point in his brief. We will therefore assume, without deciding, that Robbins as well as Cole may be held liable under § 1983 for Wyatt's constitutional injury.

III.

Bound by our prior decision in *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982), this panel affirmed the district court's grant of qualified immunity to Cole and Robbins. *See* 928 F.2d at 721-22. The Supreme Court reversed, but, as we noted above, see *supra*, at p. 5-6, indicated that "principles of equality and fairness" may suggest that private defendants "should have some protection for liability," *id.* at 1833, and expressly declined to foreclose the possibility that a showing of good faith would defeat a § 1983 action brought against individuals such as Cole and Robbins. *Id.* at 1834. The five Justices who either concurred or dissented were more forthright in their support of a standard that would relieve private parties who reasonably relied on a state statute of liability. See *id.* at 1835-37 (Kennedy, J., joined Scalia, J., concurring); *id.* at 1838-39 (Rehnquist, C.J., joined by Souter & Thomas, JJ., dissenting). When read together, we believe that the question left open by the majority was largely answered by these separate opinions. We accordingly hold that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983

only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional. We also find that Wyatt has failed to meet this standard and therefore affirm the district court's judgment.

As the Court stressed in *Wyatt*, it has consistently recognized that Congress, in enacting the Civil Rights Act of 1871, legislated against a background of common-law tort liability. 112 S.Ct. at 1831; *id.* at 1835 (Kennedy, J., concurring). See, e.q., *Owen v. City of Independence*, 445 U.S. 6722, 637-38 (1980); *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967); *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Thus, while § 1983 "Creates a species of tort liability that on its face admits of no immunities," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), the Court has read the provision "'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Malley v. Briggs*, 106 S.Ct. 1092, 1095 (1986) (quoting *Imbler*, 424 U.S. at 418)). At the same time, because the process of drawing positive inferences from legislative silence is always accompanied by a certain amount of uncertainty, the Court has only "look[ed] to the common law for guidance," and has not "assume[d] that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form." *Malley*, 106 S.Ct. at 1095. The conclusion that Congress intended to incorporate a specific defense should follow only after determining that "a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Owen*, 445 U. S. at 637 (quoting *Pierson*, 386 U.S. at 555)).

The Court in *Wyatt* identified malicious prosecution and abuse of process as the common-law causes of action most analogous to Wyatt's claim under *Lugar* and therefore focused its inquiry on the elements of these torts. While differing as to the legal consequences of their common finding, all of the Justices agreed that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause. *See* 112 S.Ct. at 1832 n.2 ("a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable

cause"); *id.* at 1835 (Kennedy, J., concurring) ("In both of the common law actions, it was essential for the plaintiff to prove that the wrong doer acted with malice and without probable cause"); *id.* at 1838 n.1 (Rehnquist, C.J., dissenting) ("it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause" (emphasis added). *See* generally *Stewart v. Sonneborn*, 98 U.S. 187, 194 (1878); 2 C. Addison, Law of Torts § 1, p. 65 (1876); J. Bishop, Commentaries on Non-Contract Law § 242, at 97 (1889); T. Cooley, Law of Torts 184 (1879); 1 F. Harper & F. James, The Law of Torts 311 (1956); *Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1219 (1979).

The majority in *Wyatt* concentrated on the immediate issue at hand--whether the purposes and policies underlying § 1983 would be served by transforming essential elements of the plaintiff's case at common law into a defense of qualified immunity to be asserted by defendants. The Court held that they would not. 112 S.Ct. at 1833-34. Justice Kennedy and, at least to some extent, Chief Justice Rehnquist accepted the majority's holding, but then moved on to consider the precise contours of the good faith doctrine they, along with the three other Justices who joined their opinions, believed would be available to Cole and Robbins on remand.

They agreed that plaintiffs, not defendants, bore the burden of proof on the questions of malice and probable cause, 112 S.Ct. at 1837 (Kennedy, J., concurring), and that, since plaintiffs were required to prove both at common law, a defendant could avoid liability under § 1983 by showing the absence of either. 112 S.Ct. at 1838-39 (Rehnquist, C. J., dissenting). Justice Kennedy and Chief Justice Rehnquist also agreed that the probable cause inquiry could not be wholly equated with qualified immunity, since the Court had previously identified the *Harlow* Court's "replac[ement] of the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action" as a "complete[] reformulat[ion] [of] qualified immunity along principles not at all embodied at common law." *Anderson v. Creighton*, 107 S.Ct. 3034, 3042 (1987) (citing *Harlow*, 102 S.Ct. at 2736-39). See 112 S.Ct. at 1839 n.2 (Rehnquist, C. J., dissenting) ("There is perhaps one small difference between the historical common law inquiry and the modern qualified immunity inquiry. At common law, a plaintiff can show the

lack of probable cause either by showing that the actual facts did not amount to probable cause (an objective inquiry) or by showing that the defendant lacked a sincere belief that probable cause existed (a subjective inquiry)").

Justice Kennedy emphazized the importance of the subjective inquiry into malice, stating that, "[u]nder common law ... if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause." 112 S.Ct. at 1836 (Kennedy, J., concurring). The justification he offered to support the prominence of this inquiry, however, cut both ways. On the one hand, he indicated that the examination of private defendants' actual knowledge of the validity of the law might lead to a finding of liability in circumstances where public officials would be shielded by qualified immunity. 112 S.Ct. at 1836-37 (Kennedy, J., concurring) ("It seems problematic to say that a defendant should be relieved of liability under some automatic rule of immunity if objective reliance upon a statute is reasonable but the defendant in fact had knowledge of its invalidity"). On the other hand, given this emphasis on what private actors actually know, rather than what they should know, private defendants might establish probable cause and avoid liability even though a right was "clearly established." Anderson, 107 S.Ct. at 3038. *See* 112 S.Ct. at 1837 (Kennedy, J., concurring) ("the existence of a statute thought valid ought to allow a defendant to argue that he acted in subjective good faith and is entitled to exoneration no matter what the objective test is").

A private defendant's good faith is especially significant because *Harlow's* qualified immunity standard is far more demanding than the objective component of the common law probable cause inquiry, since private actors are not charged with the same amount of knowledge regarding the law as public officials. As Justice Kennedy noted, "there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *id.* at 1837 (citing *Birdsall v. Smith*, 122 N.W. 626, 627 (Mich. 1909)). In addition, " '[t]he layman's ignorance of the law has been taken into account in the almost universal holding that probable cause is established where the prosecution was instituted with the advice of counsel.' "*Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988) (quoting Prosser

& Keeton, The Law of Torts § 119 (5th ed. 1984)). *See also* Bishop, § 236, at 93-94; Cooley, at 183-84; 1 Harper & James, at 313-14, 322. Aside from these bright-line rules, the Court recently provided additional guidance on the contours of the probable cause inquiry in *Real Estate Investors v. Columbia Pictures*, 113 S. Ct. 1920 (1993), where it revisited this issue in the context of antitrust sham litigation. There, the Court held that "[p]robable cause to institute civil proceedings requires no more than a 'reasonable[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.' " *Id.* at 1929 (quoting *Hubbard v. Beatty & Hyde, Inc.*, 178 N.E. 2d 485, 488 (Mass. 1961)- (alterations in original)) ; Restatement (Second) of Torts § 675, Comment e, pp. 459-60 (1977) ("In determining probable cause for initiation of civil proceedings, all that is necessary is that the claimant reasonably believe there is a sound chance that his claim may be held legally valid upon adjudication").

In light of these considerations, we think that private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity. The record in this case discloses that the Mississippi replevin statute invoked by Cole, while perhaps placed in "legal jeopardy" by our decision in *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978), see 928 F.2d at 721, remained good law at the time of his suit. Moreover, there is evidence that Cole relied on Robbin's advice in filing his compaint in replevin. We need not, however, rely on the categorical common-law rules cited above to find that probable cause supported Cole's resort to the state procedures, for, as we stated in our prior opinion, "[w]e need not conclude that a private actor is entitled to rely on any statutory relic, regardless of its current absurdity," in order to hold "that reliance upon the statute by the private actors was not an act of unreasonable ignorance." 928 F.2d at 721-22 [3]

Having concluded that Cole's and Robbins' invocation of the Mississippi statute was not objectively unreasonable, we turn to consider whether they in fact believed the statute to be constitutionally valid at the time of the suit. Wyatt contends that Cole's professed good faith reliance on the replevin procedures is undermined by the existence of several facts tending to show that Cole filed the complaint out of malice. Wyatt alleges that Cole threatened to use "political influence" to secure the return of his cattle, had no grounds under state law

for bringing his action in replevin, and refused to restore the property seized in violation of a state court order.

We will assume for purposes of decision that Wyatt's account of these events is true. We do not see, however, how these allegations detailing Cole's misuse and abuse of state procedures bear on whether he in fact believed the Mississippi statute to be constitutionally infirm. It is this narrow question, not whether Cole exhibited a generalized "malice" by filing suit for improper reasons, that is relevant in determining whether probable cause lies. As we noted above, see *supra*, p. 8-9, state law claims are not cognizable under § 1983. Wyatt seeks to hold Cole liable for damages for invoking the statute that led to the deprivation of his property without due process. Unless we may infer defendant's knowledge of federal law from his alleged violations of state law, the latter have no bearing on the probable cause inquiry. In the absence of any evidence that either Cole or Robbins had actual knowledge of the replevin statute's constitutional infirmity, we hold that the district court properly barred Wyatt's damage claims against them.

IV.

For the foregoing reasons, we affirm the district court's judgment.

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[3] Wyatt argues that Robbins, as an attorney, should be held charged with a greater knowledge than other private defendants. We disagree. As we indicated in our first opinion, Robbins "is subject to the same standard of good faith as Cole because the relevant distinction is between persons acting privately and those acting for the state." 928 F.2d at 722 n.5.

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT ROBBINS IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Robbins would respectfully direct this Court's attention to its previous opinion in this case, *Wyatt v. Cole*, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992), for the relevant facts. On remand, the Court of Appeals for the Fifth Circuit reported the facts relevant to the successful good faith defense in affirming the district court's decision, *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993). The Court of Appeals decision is also attached as the Appendix to the Petition.

ARGUMENT IN OPPOSITION TO GRANT OF WRIT

In this Court's previous opinion, all Justices recognized that an affirmative defense of good faith reliance upon a presumptively valid statute could be raised in the context of a Section 1983 action against private persons under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The Court said, "[W]e do not foreclose the possibility that private defendants faced with Section 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that Section 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Wyatt v. Cole*, 112 S.Ct. at 1834.

Mr. Wyatt, in his Petition, simply misstates the basis of the Court of Appeals' decision. The Court of Appeals' holding, as quoted in the Petition at 4, shows that the court properly discarded its earlier qualified immunity rationale under *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982). The holding shows the Court of Appeals concluded, under its analysis of the outlines of the good faith defense, that Respondents bear no Section 1983 liability to Wyatt under the facts of this case.

In his Petition, Wyatt appeals to this Court's sense of fair play by asserting that the "immunity" provided to Cole and Robbins leaves the innocent victim without a remedy as against wrongdoers, even those acting in ignorance. Petition at 5. However, Wyatt was free to choose any avenue of vindication. That he chose to claim a right encumbered necessarily with *Lugar*'s complex rules and defenses to his own detriment is no argument to visit such detriment upon Respondents.

In any event, the Court of Appeals examined the bases of a good faith defense and correctly found that Wyatt had failed to meet his burden of proof. Section 1983 expressly provides no immunities or defenses, *Imbler v. Pachtman*, 424 U.S. 409 (1976). However, Section 1983 has always been read " 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Malley v. Briggs*, 475 U.S. 335 (1986), *quoting Imbler*, 424 U.S. 418.

The Court of Appeals then reviewed the three opinions of this Court for common elements of the good faith defense. The majority opinion noted forthrightly that at common law private defendants could avoid liability for malicious prosecution or abuse of process if they acted without malice and with probable cause. *Wyatt*, 112 S.Ct. at 1833, fn. 2. Concurring, Justice Kennedy said "[i]n both of the common law actions, *it was essential for the plaintiff to prove* that the wrongdoer acted with malice and without probable cause." *Id.* at 1835 (emphasis supplied). Dissenting, the Chief Justice said that describing the unwitting reliance upon an invalid statute as a good faith "defense" was something of a misnomer: at "common law it was the *plaintiff's burden* to establish as elements of the tort both that the defendant acted with malice and without probable cause." *Id.* at 1838, fn. 1 (emphasis supplied).

Based on these common elements, and its analysis of the common law torts of malicious prosecution and abuse of process, the Court of Appeals concluded that where plaintiffs seek to hold private defendants liable under *Lugar*, they must show that the defendants acted with

malice and that the defendants acted without probable cause. *Wyatt*, 994 F.2d at 1120.

There is no evidence in this case that Cole or Robbins acted with malice or without probable cause. Wyatt suggests that based on the Court of Appeals' decision in *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978), Cole, or at least the attorney Robbins, knew or should have known that the Mississippi statute was unconstitutional. *Johnson* notwithstanding, the Supreme Court of Mississippi opined in 1979 that the Mississippi replevin statute, amended subsequent to *Fuentes v. Shevin*, 407 U.S. 67 (1972), was constitutional. *Finance America Private Brands, Inc. v. Durbin*, 370 So.2d 1365 (Miss. 1979).

As the Court of Appeals observed, Robbins' and Cole's "invocation of the Mississippi statute was not objectively unreasonable." *Wyatt*, 994 F.2d at 1121. The court then turned its attention to examining whether they had subjective knowledge of the constitutional infirmity. Wyatt argued that Cole acted with malice in at least three ways: he threatened Wyatt with unspecified "policitcal influence"; he had no grounds for bringing the replevin action; and he subsequently disobeyed a court order to restore the livestock.

However, these claims of "malice in the air" do not speak to the specific question a plaintiff in a 1983 action against private defendants must answer: whether the defendants knew or should have known of the statute's unconstitutionality; that is, whether they acted with malice and without probable cause. *Wyatt*, 994 F.2d at 1121. Even if Robbins' and Cole's actions amount to a misuse of state procedures, facts indicating such misuse do not

address the state of their knowledge about the *statute's* invalidity. Under Section 1983, Wyatt seeks to hold Cole and Robbins liable for depriving him of his cattle without due process under federal law, not for abuse of state process.

On summary judgment Wyatt bore the burden of coming forth with evidence upon issues he would have had to prove at trial, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). His failure to produce any evidence relating to the defendants' actual knowledge of the statute's infirmity, or evidence showing that they should have known of its invalidity, means that the Court of Appeals' judgment upon remand was correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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